SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 146.

REMINGTON PAPER COMPANY, *Plaintiff in Error.*

versus

JOHN W. WATSON, FRANK H. POPE AND THE LOUISIANA PRINTING AND PUBLISHING COMPANY, LIMITED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief of Remington Paper Company, Plaintiff in Error.

On May 29, 1893, the Remington Paper Company brought suit in the United States Circuit Court for the Eastern District of Louisiana, against the Louisiana Printing and Publishing Company for thirty-eight hundred and sixty-three 55-100 dollars

($3,863.55), and seized under writs of attachment and sequestration property sufficient to satisfy the said writs. (Rec. 115 and 119.)

On May 30, 1893, John W. Watson, falsely claiming to have been appointed receiver on May 17, 1893, by the Civil District Court for the Parish of Orleans, in the proceedings entitled *In re* Frank H. Pope vs. Louisiana Printing and Publishing Company, Limited, No. 3900 of the docket of said court, and suggesting that he had been in possession of the property seized under such appointment since May 17, 1893, moved the court on said alleged appointment, to release and set aside the seizures. (Rec. 124.)

The Remington Paper Company, plaintiff in error, filed an exception to the motion or rule:

That said Watson as a pretended receiver can not interfere in the progress of this suit in the informal and summary manner attempted, and had no right to demand by the judgment of the court anything, without coming into court in the manner prescribed by law, and in the event the exception was overruled, but not otherwise, to answer, denied the allegations made in the motion or rule and denied that John W. Watson, the pretended receiver, had any legal right or authority under the *ex parte* proceedings on which he relies to take possession of property attached or hinder or delay your petitioner from collecting its just debt against the Louisiana Printing and Publishing Company, Limited (Rec. 125).

The rule or motion to dismiss the attachment and sequestration was tried and submitted both on the exception and the answer on June 10, 1893. And on the trial it was shown that John W. Watson on an *ex parte* application of one Frank H. Pope filed in the State court May 17, 1893, had been appointed receiver without *citation of the corporation or any one interested* (Rec. 127).

That the court in the order May 17, 1893, appointing Watson grants it "considering the foregoing petition and particularly the *intervention of the State of Louisiana by her Attorney General* and of the creditors mentioned" (Rec. 127), when in truth and fact the intervention of the attorney general was not filed till the next day, or the 18th day of May, 1893. (Rec. 130.) In the or-

der the court said: "Let said John W. Watson take the proper legal oath and otherwise properly qualify."

It was only on June 6, 1893, that Watson applied to the court to have the amount of his bond fixed, a week after the attachment or sequestration of plaintiff in error had been executed.

No proof or evidence was offered. (Rec. 155.) That said *ex parte* order of this court dated the 17th day of May, 1893, purporting to appoint John W. Watson receiver of the Louisiana Printing and Publishing Company, Limited, was obtained in violation of the fifth and fourteenth amendments to the constitution of the United States in this, that said decree was obtained without due process of law, it being *ex parte* and without affidavits, bond or proof, as more at large and fully alleged in the original petition, and the said unconstitutional and void order and decree is set up and alleged by the defendants as a bar and a defence to prevent your petitioner from recovering and having its just and valid debt from its debtor, the Louisiana Printing and Publishing Company, Limited, and thus depriving petitioner of its claim duly secured by due and legal process of law on property of its said debtor and seized under said writs from said Circuit Court of the United States, and said defendants seek through said void *ex parte* order of 17th of May, 1893, to effect the transfer and of the possession and property of said Louisiana Printing and Publishing Company under seizure of petitioner under its writs to said John W. Watson, thereby screening the same from ordinary and legal pursuit of creditors in the modes pointed out by law, in violation of the fifth and said fourteenth amendments of the Constitution of the United States (Rec. 10 and 11).

The following order was rendered on Tuesday, June 6, 1893:

This cause having been heard "and submitted upon a rule taken by J. W. Watson, appointed receiver of the defendant by the Civil District Court for the Parish of Orleans, to set aside the writs of attachment and sequestration issued in this cause, and upon the exception thereto filed by the plaintiff, and same having been considered by the court, it is now ordered, for the reasons assigned in the written opinion on file, that the marshal restore the property seized in this cause under the writs of attachment and sequestration to John W. Watson, re-

ceiver, unless *within five days* the plaintiff applies for and ultimately receives authority from the Civil District Court which appointed Watson or from the appellate court to hold same under the writs" (Rec. 140).

The plaintiff, the Remington Paper Company, desiring to sustain its attachment and sequestration on June 9, 1893, in the receivership proceedings and in an action against John W. Watson and Frank H. Pope in solido, applied to the Civil District Court for authority to hold the property under its said writs (Rec. 1, 2, 3 and 4) and by amendment to the petition filed May 24, 1894, averring (pp. 10, 11)—

This application was met by the following exceptions filed by John W. Watson calling himself receiver—

1. That said petition disclosed no cause of action.

2. That said action is premature, even if it could be maintained at all, which is denied.

3. That proper and necessary parties have not been made hereto.

4. That the question of the validity of the attachment and sequestration sued out in the Federal court is either settled by the decision of the United States Circuit Court adverse to the pretensions of the Remington Paper Company in a litigation between this receiver and said Remington Paper Company—involving the validity of the seizure thereunder, and if so, said decision is now *res judicata* upon the question of said attachment and sequestration."

"And in the alternative exception (*sic*) says that if said ruling is not *res judicata* upon the validity *vel non* of said attachment and sequestration are still pending and undetermined between said Remington Paper Company—your exceptor, in court of concurrent jurisdiction, and in that event exceptor pleads the plea of *lis pendens* and prays that all the foregoing exceptions be sustained, and the action herein of the Remington Paper Company be dismissed at its costs." (Rec. 4.)

The exceptions filed by Frank H. Pope are substantially the same save that the plea of *lis pendens* is omitted. (Rec. 5.)

The exception of John W. Watson *individually* is practically the same as that of John W .Watson, receiver, except that the plea of want of proper parties is made last of all. (Rec. 5 and 6.)

•the absolute illegality and nullity of the so-called appointment of J. W. Watson, receiver, and praying for judgment against him for thirty-eight hundred and sixty-three dollars ($3863) damages, and asking that his appointment be declared null and of no effect against plaintiff in error. The petition will be found at pages 1, 2, 3 and 4 of record, and the amendment thereto at pages 10 and 11.

A glance at the prayer of plaintiff's petition will show that Watson *was never sued as the receiver of the defendant company* (Rec. 3 and 4).

Watson next files an answer denying all and singular the allegations of the petition of the Remington Paper Company.

He *admits* that he was duly appointed receiver of the defendant company, avers the validity of the appointment, denies the charge of fraud, collusion and conspiracy in the matter of his appointment or that he has any knowledge or even suspicion of any improper acts of any officers of defendant company and expresses confidence in them and in their motives and reconvenes for $3,847.15 damages to the *defendant company.*

He also prays that his appointment be *notified* (ratified) and confirmed. (Rec. 9 and 10.)

To this reconvention is filed by the Remington Paper Company the following exceptions:

"The said Remington Paper Company comes by Merrick & Merrick, its attorneys, on whom service of process has been made in said suit against it and said Lyons and for exception says:

That it denies especially that said John W. Watson has been appointed in a legal manner and in any suit with the proper parties, a receiver of said Louisiana Printing and Publishing Company with power to stand in judgment, to prosecute suits on behalf of said company; seeking to recover its debts against said Louisiana Printing and Publishing Company, and having instituted a suit with demands in sequestration and attachment levied say 29th day of May, 1893, being No. 12,167 in the Circuit Court of the United States for the Eastern District of Louisiana, on a debt of $3,863 55 against said last mentioned company and alleges that said Watson under his said pretended title of receiver has at various times, say on the 30th day of May, June 1, June 20 of present year, and at other times intruded himself into said suit on simple motions and endeavored under cover of his said pretended capacity of receiver to procure and take from the United States marshal the goods sequestrated and attached and held by this exceptor's sequestration and attachment at his great cost, and otherwise to hinder this exception (exceptor) in the prosecution of its just demand against said Louisiana Printing and Publishing Company.

And this defendant denies that said pretended stockholders ever conferred on said Watson the capacity and power he has alleged in his said petition to represent said corporation; and denies that a meeting of the stockholders of said corporation was ever convened in a corporate meeting in accordance with the eighth article of the charter of said company and especially denies that said stockholders have conferred or could have conferred any capacity on said Watson to stand in judgment for said company."

"Wherefore this defendant prays that this exception be maintained and that said Watson be declared to be without said alleged capacity to prosecute this suit and further to continue vexing this defendant in the collection of his debt against said Louisiana Printing and Publishing Company, Limited, under the pretence that he is receiver of said company and that he be decreed to pay the costs."

"*Second.* And in the event the foregoing exception to the pretended capacity of said Watson be overruled, and not otherwise, this exception (exceptor) further excepts and says that the said petition against said Remington Paper Company and (Thomas B. Lyons) discloses no cause of action against this defendant." (Rec. 7 and 8.)

These exceptions filed to the reconventional demand were considered on a trial of the merits—

The Remington Paper Company having made the required application so far as was possible, the property attached and sequestered remained in the hands of the United States marshal.

But on September 14, 1893, a rule was taken in the so-called receivership proceeding in the Civil District Court by one Thos. B. Lyons, claiming to be owner of the premises in which the property of the Louisiana Printing and Publishing Company, Limited, was situated, and one D. J. Norwood, claiming to be lessee of said property for the year commencing September 30, 1893.

The rule suggested that the said property was lawfully in the possession of John W. Watson, receiver; that Watson had been placed in legal possession by orders of the Court; that in contempt and disregard of the authority of the court the Remington Paper Company, represented by Merrick & Merrick, sued out an attachment and caused the United States marshal to seize the

property in the hands of an officer of the State court; that the Federal judge had dissolved the attachment and the plaintiffs had not appealed nor taken a writ of error *nor applied to the State court to permit the attachment to hold.*

That movers were entitled to their rent and possession and would be damaged in the sum of $600 by not getting possession in order to lease for the ensuing year.

The rule then ordered the United States marshal and plaintiff, the Remington Paper Company, to show cause why they should not cease and desist from in any way interfering with Watson (calling himself receiver) in the possession and enjoyment of the property seized, and be punished for contempt of the authority of this court and said Watson be protected in his possession.

Watson was also ordered to show why the rent due Lyons should not be paid—(Rec. 157, 158).

To this rule the Remington Paper Company excepted on the ground that the State court was without authority to interfere with them for the reason that they hold the property under a writ of attachment issued from United States Circuit Court and that the proceedings should have been taken in United States Circuit Court. (Rec. 162.)

For answer to rule the Remington Paper Company filed a general denial, but specially admitted having the property under seizure under a valid writ of attachment from the United States Circuit Court in suit No. 12,197 of the docket of that court and entitled Remington Paper Company vs. Louisiana Printing and Publishing Company, Limited. The Remington Paper Company denied also that the writ of attachment had ever been dissolved or set aside (Rec. 162).

The State court then rendered the following order:

"It is therefore ordered, adjudged and decreed that so far as this is a rule for contempt is concerned, it not appearing that the marshal was officially notified of the proceedings here, the question of contempt is reserved.

It is further ordered that the possession of the receiver, John W. Watson, be maintained and J. B. Donally, United States marshal, and the Remington Paper Company do cease and desist from all interference with John W. Watson, the receiver, in the posses-

sion of the property of the Louisiana Printing and Publishing Company and especially of the printing presses, type, etc., and contents of the houses 41 and 43 Natchez street; and it is further ordered that John W. Watson, receiver, be instructed to proceed with his duties and the rule be so far made absolute as to order the receiver to sell the property contained in the buildings Nos. 41 and 43 Natchez street after thirty days' advertisement, and the receiver will be authorized on the filing of his account to pay the rent on the two buildings, Nos. 41 and 43 Natchez street, for the month of October, 1893, and the rights of the Remington Paper Company and of the lessors as well as all the other creditors are reserved and referred to the proceeds, and in other respects the ruling of the court is reserved. (Rec. 159.)

A bill of exceptions was taken to the ruling of the court on the ground that the attachment and sequestration issued from the United States court legally issued under the Constitution and laws of the United States—

That said writs had never been set aside, although the said Circuit Court had rendered an order that the marshal restore the property attached and sequestered to John W. Watson, receiver, "unless within five days the Remington Paper Company applies for and ultimately receives authority from the Civil District Court which appointed Watson, or from the *appellate court*, to hold same under said writs;" the said Remington Paper Company *had made application to said Civil District Court* which had been denied, but said judgment had not become final and a motion of appeal had been taken therefrom" * * * (Rec. 98).

An appeal was applied for from the order of the State court upon the marshal to release, but this appeal was denied and the Supreme Court affirmed the position of the trial judge. 45 An. 1418, State ex rel. Remington Paper Company vs. Watson. The exception of no cause of action filed by Watson had been sustained.

An appeal was taken from the judgment sustaining the exception of no cause of action and the Supreme Court of Louisiana in Paper Company vs. Watson, 46 An. 793, reversed the judgment of the trial judge and remanded the case for trial.

On the trial of the case plaintiff offered in evidence testimony

taken under commission to prove its claim and the proceedings in the United States court; and for the purpose of showing their nullity and invalidity also offered the illegal petition for a receiver, said petition *being unaccompanied by affidavits or any other proof, or parties defendant, or prayer for citation;* and for the same purpose the order of court; also the paper purporting to be an intervention of the State; the petition of Watson filed June 6, 1893, praying the court to fix the bond of the *soi disant* receiver and the order of court thereon; and afterward on the trial of this case the defendants offered to give in evidence two documents purporting to be the signature of certain stockholders of said company to a consent that Watson be confirmed as receiver.

But plaintiff claiming that its rights were fixed by the due and legal institution of its said suit according to the due process of law in the United States court on May 29, and the writs therein issued and served, and that defendants could not by any acts on their part subsequent to said seizure deprive plaintiff of its rights as a suitor in the United States court nor substitute any other person in the place of plaintiff's debtor; nor cure the nullities arising from defendants, purely *ex parte* proceeding without any of the forms of Louisiana law or due process of law.

And that plaintiff being invested by the Constitution and laws of the United States in and by virtue of its just demand and lawful proceedings against said Louisiana Printing and Publishing Company, Limited, in the courts of the said United States, could not be deprived of its rights by said illegal action nor by the subsequent attempt of defendant to cure the fatal defect of the purely *ex parte* proceedings filed May 17 and May 18, 1893, objected to the evidence.

The trial judge, however, admitted the evidence, and a bill of exceptions was taken, prepared and allowed.

Other bills of exceptions were taken to the rulings of the State court and the United States court which will be noticed hereafter.

Assignments of Errors.

First.—That whereas the said Remington Paper Company, the plaintiff in error, a citizen of the State of New York, did, on

the 29th day of May, 1893, institute an action at law in the Circuit Court of the United States for the Eastern District of Louisiana for the recovery of a debt against the Louisiana Printing and Publishing Company, Limited, a corporation and a citizen of the State of Louisiana, on law side of said Circuit Court, having jurisdiction over said case, to recover the sum of thirty-eight hundred and sixty-three and 55-100 dollars ($3,863 55) due by said defendants in that court, with interest, and said plaintiff, there having been legal and just grounds for the same, obtained from said United States Circuit Court, on sufficient showing with proof and bond, a writ of attachment and sequestration, which said writs were served on said Louisiana Printing and Publishing Company, Limited, by the marshal of the United States for said Eastern District of Louisiana, on the 29th day of May, 1893, and the property subject to said writs, sufficient in value to pay and satisfy petitioner's debt, was seized and taken into the custody of said marshal, an officer of said court of the United States, which said suit and its incidents in said Circuit Court of the United States, the same having jurisdiction thereof, is still pending against the said Louisiana Printing and Publishing Company, Limited, and whereas the said Civil District Court of the Parish of Orleans, Division A, did, on the 17th day of May, 1893, in a proceeding without parties, affidavits, or proof or bond, make an order in form, the same being in fact absolutely null and void and of no legal effect, wherein said John W. Watson was ostensibly appointed a so-called receiver to the said Louisiana Printing and Publishing Company, Limited, and said John W. Watson, on the 18th day of May, filed in the same court a supposed oath of office under said illegal and void *ex parte* order; and whereas said order of said District Court was absolutely null and void as against third persons, and also as against the said Louisiana Printing and Publishing Company, Limited, a corporation with a charter unforfeited, the debtor of plaintiff, whose ownership of property could not be divested to the prejudice of creditors on an arbitrary order without due process of law; and whereas the said John W. Watson, by wrongfully representing himself as a receiver and in possession of said attached and sequestered property ~~as such~~ of said Louisiana Printing and Publishing Company, Limited, on the pretence of said void

order of May 17, 1893, obtained an order in that court directing the said marshal to release said property to said Watson, unless petitioner within five (5) days brought suit in the State court (this suit being a compliance with that order) for authority to prosecute that suit; and whereas petitioner's right to prosecute its said suit against its said debtor, an existing corporation, was and is by law and the constitution a well-established right, of which petitioner can not be deprived without due process of law: Now, therefore, said judgment of the lower court is erroneous in sustaining said *ex parte* and void order of 17th May, 1893, and in refusing to declare the same null and void and as no obstacle to petitioner's further prosecution of said suit and as conferring no valid or actual authority to deprive petitioner's said debtor of its ownership and possession of its property, and to hinder, delay, or to defeat petitioner in the recovery of its just debt against its said debtor.

Second.—The plaintiff having a constitutional and just cause of action against its said debtor, and, by reason of citizenship, a just right to bring its action in the said Circuit Court of the United States for the Eastern District of Louisiana, of which said right to sue in said court petitioner availed itself, and having rightfully seized by attachment and sequestration the property of its said debtor subject to said seizure, the said lower court erred, the Supreme Court of Louisiana, against and in violation of the constitution and laws and the powers and duties of the officers of the United States, conferred by law, in maintaining said *ex parte* and absolutely null and void order of 17th May, 1893, against the vested rights of petitioner to prosecute said suit in said court of the United States against its said debtor, as shown by said transcript of said Circuit Court of the United States on file in this case and made a part of the bill of exceptions.

Third.—The said lower court, the Supreme Court of Louisiana, also erred in not reversing the ruling of the Civil District Court allowing the defendants to offer in evidence, in justification of their action, the document entitled "Division A, Civil District Court for the Parish of Orleans; Frank Pope vs. The Louisiana Printing and Publishing Company, Limited; rule of Lyons vs. Norwood, filed September 14, 1893, H. Messonnier, deputy clerk;

any the decree thereon in full is identified with this bill of exception by my signature."

Which said rule in said State court, identified as aforesaid, was served on plaintiff's counsel and the said marshal of the United States having custody of the property seized, subject to petitioner's debt, charging them also with contempt of said State court on account of the detention of said property under said writs the 16th day of September, 1893. With said rule filed on the 14th day of September, 1893, which was taken by Thos. B. Lyons and D. J. Norwood, offered as aforesaid in justification by defendants, and were offered with said rule the answer of J. B. Donnelly, the marshal of the United States, and the answer of petitioner's attorney on behalf of petitioner, denying the jurisdiction of said State court, and plaintiff's bill of exception, filed October 12, 1893, in said proceedings in the said rule of T. B. Lyons and D. J. Norwood, as well as the order of said State District Court of 26th day of November, 1896.

And the said lower court and the Supreme Court of Louisiana erred in admitting said proceedings and orders taken and made and executed under said rule against J. B. Donnelly, the said United States marshal having custody of said property under the writs of said United States court, and petitioner, as a suitor in said United States court, and depriving petitioner of its rights against its debtor, then and still being an existing corporation, on the ground that said proceedings before the lower court in all its particulars was *coram non judice;* which excess of jurisdiction assumed by the lower court and in the Supreme Court of Louisiana, in the language of the courts of the United States, is sometimes called usurpation, and is utterly null and void and in no way binding on plaintiff, but, on the contrary, shows the unjustifiable damage done by the defendants to plaintiff in their unwarranted acts in attempting to prevent the prosecution of its right in said court.

Fourth Assignment of Errors.—The said lower court, the Supreme Court, on appeal also erred in receiving in evidence, against plaintiff's objections, as a defence in favor of defendants, any and all the proceedings of the defendants or any of them or others, under the said *ex parte* proceedings entitled Frank H. Pope vs. The Louisiana Printing and Publishing Company, Limited,

No. 39,100, offered in this case on or after and subsequent to said 29th day of May, 1893, on the ground that the jurisdiction of the Circuit Court of the United States having rightfully attached in the said case of petitioner against its debtor, the Louisiana Printing and Publishing Company, Limited, at said date, the rights of plaintiff could not be defeated or ousted by any subsequent proceedings on the part of defendants or any of them, nor could said plaintiff's debtor be deprived of its property to plaintiff's great damage without due process of law, and all of said proceedings in said *ex parte* proceeding entitled Frank H. Pope vs. The Louisiana Printing and Publishing Company, Limited, No. 39,100, set up as a defence, are violations of amendment No. XIV of the United States and null and void.

Fifth Assignment of Errors.—The lower court erred in its judgment and conclusions on the whole case and in rendering judgment against petitioner and in favor of defendants, except so far as dismissing the reconventional demand.

Points of Law or Fact.

At the time the Remington Paper Company sued out its writs of attachment and sequestration in the Circuit Court of the United States against the Louisiana Printing and Publishing Company, Limited, there was no legal obstacle to those proceedings for the following reasons:

First. That at date of petitioner's said seizures on the 29th day of May, 1893, said Watson had not given bond, nor complied with any order of court in the *ex parte* proceedings, nor had any such proceedings been had as to perfect said order, or to give said Watson any right to control the property of defendant or to prevent any suit from being brought or any court from subjecting the property of said defendant by due process of law to the payment of debts, and the conduct of Pope and Watson and those confederating with them in attempting to screen the property from petitioner was collusive and a constructive fraud upon petitioner and a violation of its rights under the laws and Constitution of the United States.

Second.—That the said order of 17th of May was absolutely

null and void as against petitioner and the creditors of the defendant corporation and conferred no authority on said Watson for the reason the same was made upon the collusive petition of Frank H. Pope, without citation to any one, without oath or affidavit or any proof, or *contestatio litis*, and said inchoate and pretended order was obtained the same day on said *ex parte* and collusive petition.

Third.—That the officers of the defendant corporation were incapable in law of withdrawing from their offices so as to delay or hinder its creditors in the pursuit of their rights, and that said corporation does not cease to exist until regular proceedings have been taken against its numerous officers and stockholders.

Fourth.—That the attempt to bolster up the illegal, *ex parte* proceedings by so-called intervention on the part of the Attorney General will not cure the nullity of said *ex parte* proceedings of said Pope and Watson, and, moreover, said so-called intervention is without affirmative allegations, and simply recites what said Pope says, and that the State is without right to intrude itself in this manner into the controversy of private persons and demand forfeitures in any other manner than the mode prescribed by law; that said Attorney General was without authority to join said Pope in his *ex parte* petition without due process of law and pray for the appointment of a receiver.

Petitioner shows that no citation was issued until 27th May, 1893, to any one, and none prayed for, and no return was made until service had been made of the writs of sequestration and attachment.

The order of the judge of the State court was just as much a nullity as if he had rendered in his office a judgment against any other citizen *without a citation—or summons.*

There are no chancery powers vested in the State courts of Louisiana and perhaps that is the reason that they impute such extensive powers to themselves when overstepping their own jurisdiction—e. g., the power to dispose of the property and rights of a corporation without having *the res or defendant brought into court by any manner of process whatever.*

Your Honors have said:

"A sentence of a court pronounced against a party without a hearing or giving him an opportunity to be heard is not a judicial

determination of his rights and is not entitled to respect in any other tribunal." Windsor vs. McVeagh, 93 U. S. 474. See also Smith vs. Reid, 134 N. Y. 568.

In Gluck and Becker on Receivers, p. 5, the principle is stated thus:

"It is a condition precedent—a jurisdictional essential—to the exercise of the appointive power that a cause be pending and that the *corporation over which it is proposed to extend the receivership be a party thereto.*" (Our italics.)

32 Ill. 79, Baker vs. Backus.

30 Ia. 148, French vs. Gifford.

49 Pa. 310, Granestine's Appeal.

31 Ala. 41, Labauve vs. Slack.

" It is well established that courts *have no jurisdiction* to ap-
" point receivers for corporations in the absence of express statu-
" tory authority. High on Receivers, Secs. 287, 288, 292, 307 and
" 749, and authorities there cited, French vs. Gifford, 30 Iowa, 158;
" Hedges vs. Pacquet, 3 Oregon, 77.

" To this doctrine in its broadest statement there may be some
" exceptions, confined, however, to cases of *extreme necessity, such*
" *as when* corporate property is abandoned or where there are
" no persons to take charge of or conduct its affairs."

" No other exception has ever been hinted at even in any *dic-*
" *tum* of this court. Stark vs. Burke, 5 An. 740; N. O. Gas Light
" Co. vs. Bennett, 6 An. 456; Brown vs. Union, 3 An. 182."

Baker vs. Louisiana Portable Railroad Co., 34 An. 757.

Again: " No principle of law is better settled than that
" courts have no power to appoint a *receiver ex parte* without no-
" tice or hearing of the party in interest and unless a basis for ap-
" pointment is alleged and proved. High on Receivers, Secs. 17,
" 111, 115; Frazier vs. Wilson, 4 Rob. 517; Martin vs. Blanchin,
" 10 An. 237; Mallady vs. Mallady, 26 An. 438. *The power of*
" *courts in Louisiana is exceptional and limited.*"

" Baker vs. Portable Company, 34 An. 754; 43 An. 832, State ex rel. vs. Brittin et al."

Acting on your Honor's statement that an order appointing a receiver by *request of a small creditor* and *without evidence* and without citing the corporation to be placed in the hands of the re-

ceiver or "giving it an opportunity to be heard" is "not a judicial determination of his rights and is *not entitled to respect in any other tribunal*" (93 U. S. 474, Windsor vs. McVeagh) the plaintiff disregarded the so-called appointment and proceeded in the United States Circuit Court to recover his legal rights—and well could he have done so under the decisions of this court, but that Judge Billings was anxious to show all comity that might be demanded by the Federal jurisprudence where there may be a possibility of conflict between the Federal and State courts, and went further than reason and justice required to render the order:

"That the marshal restore the property seized in this cause "under the writs of attachment and sequestration to John W. "Watson, receiver, unless within five days the plaintiff applies for "and ultimately receives authority from the Civil District Court "which appointed Watson or from the appellate court, to hold "same under said writs."

Judge Billings' reasons for rendering this order were that comity required the court which made the *irregular appointment to correct it.* (Rec. 139.)

He failed to distinguish between an irregular order and one which was an absolute nullity for want of process, parties, *or evidence.*

However, we have complied with Judge Billings' order and have made application to the State court to sustain the attachment, and this suit now coming up from the *State court itself the question of comity does not enter further into the argument,* but the question of our constitutional and legal rights to sustain an attachment and sequestration properly sued out before a court of competent jurisdiction as against the most glaringly null,void, and un-American order it has been our misfortune to witness, is the matter for your Honors to decide.

The suit brought in the State court was brought in the form of an action of nullity of the *ex parte* order and conformed to the decree of the Circuit Court.

The action is given by law, C. P. 604: "One may demand the nullity of a judgment for any of the causes provided in this section, even if no appeal have been taken from the same, or if the delay for taking the same have expired."

C. P. 612: "The nullity of a judgment rendered against a party without his having been cited, or by an incompetent judge, even if all the formalities of the law have been observed, may be demanded at any time, unless the defendant were present in the parish and yet suffered the judgment to be executed against his property without opposing the same." * * * Article 607 of C. P. is only illustrative of grounds. (42 An. 607.) The case of Jack vs. Harrison, 34 An. 736, 740, shows the power of the court to "brush the obstacle interposed out of his way."

See also Brusiere vs. Williams, 37 An. 388; Clark vs. Christine et al., 12 L. 396.

See case of Morris vs. Cain's Executor, 34 An. 665, as to right to clear obstructions to a sale.

Baylie vs. Baylie, 37 An. 529; Merrick vs. McCausland, 24 An. 256.

The action of nullity is the appropriate action for third parties. There is therefore no ground to liken this case to a case of malicious prosecution, nor to a simple revocatory action. Nor is it a simple revocatory action. The party who has a privilege or mortgage is not bound to surrender his rights on the property he has seized.

The action of the plaintiff in error was met in the State court by exceptions and among them the exception that the petition of plaintiff in error disclosed no cause of action.

This exception was sustained by the lower court, but upon appeal the State Supreme Court reversed the judgment and remanded the case. In their opinion on the trial of the exception the State Supreme Court say:

"It is not readily perceived on what theory the defendant's plea of no cause of action rests, or on what thereon the judge *a quo* maintained said exception and dismissed the plaintiff's suit.

"It is correct that this writ has for object the removal of the receiver, so as to leave the course of proceedings in the United States Circuit Court untrammeled and free; and if, in point of law and fact, his petition be taken as true, he is undoubtedly entitled to judgment."

There is no question that the allegations of the petition of the Remington Paper Company were sustained in so far as proof

of the service of the writs of the plaintiff on the defendant corporation before any citation or other process had issued from the State Court; that the *soi disant* receiver was appointed without evidence, without even an *ex parte* affidavit; the order issued was conditioned upon Watson's giving bond, which he did not give until June 10, 1893, long after the attachments and sequestrations were served and the day after our application to the State Court to mantain said writs.

Therefore this case presents the important point, whether a citizen of the United States can be deprived of its security for the payment of its debts without due process of law, by depriving its debtor of its property and stripping it of property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

There is no question of comity in it, as our application may be now considered as to the State Court, but there are authorities to show that the Court whose *process first issued* is the one entitled to try the case.

"Priority of jurisdiction depends not upon the date of the "commencement of the suit or filing of the bill, but is determined "by the service of process."

Gluck & Becker, p. 99.

"Priority of jurisdiction as between the State and the "United States Courts is determined by the service of process, and "not by the date of the commencement of the suit."

I Bissel 260, Bell vs. Ohio Life and Trust Co. This case is stated as follows:

"On the 16th of October, 1858, Bell & Grant filed in the "clerk's office of this Court a bill against the Ohio Life and Trust "Company, their assignees and others, upon which a subpœna "was issued and served the same day upon five of the members of "the company.

"On the 18th, at 10 o'clock A. M., upon notice to the defend- "ants, who appeared in person and by their solicitors, the judges "of this Court made an order appointing a receiver of the Trust "Company, and enjoining the assignees from disposing of the "assets, and ordering them to hold the assets subject to the further "order of the Court.

"These assets, consisting of notes, bonds, stock certificates, "etc., were at the time in the actual possession of the assignees of "the Ohio Life and Trust Company, and they had deposits with "certain bankers in Cincinnati on current account.

"On the same morning, but subsequent in time, in the pres- "ence of the parties, one of the judges of the Superior Court in "Cincinnati made an order in a case then pending in that Court, "in which Spinning & Brown were plaintiffs and the assignees of "the Trust Company defendants, appointing the sheriff of Hamil- "ton county receiver, and requiring the assignees to deliver the "assets to him.

"This case had been commenced on the *14th of October* by "filing a petition, and a *summons had been issued on the same "day* in accordance with the Code of the State, *but had not been "served.*"

"The sheriff, *without giving bond* or *taking an oath*, imme- "diately proceeded as such receiver to demand of the assignees "the possession of the assets, and they were delivered to him by "one of the assignees who had personal notice of the order made "in this Court. The receiver appointed by this Court made due "demand of the sheriff for the delivery to him of the assets of "the company, at the same time exhibiting to him his authority as "receiver under the order of the Court. Delivery was refused by "the sheriff, he claiming to hold the assets as receiver under an "order of the Supreme Court of Cincinnati."

"Rule against the sheriff to show cause why he should not "be attached for contempt."

The Court held that, inasmuch as under the laws of Ohio actions were commenced by petition and summons, and as the *process of the United States Court was served first*, that Court took priority of jurisdiction over the State Court, though the State Court suit had been *first* commenced.

On page 260 Judge McLean says:

"An action, like every other thing, must have a beginning. The filing of the petition is one thing, the præcipe another, and the issuing of the summons another, and the service and return another; all these are in the Code. They belong to the same class. In the order of time they succeed each other and are essential to

give jurisdiction over the parties and the subject matter of the controversy." (1 Bissell 266. *Vide quoque* 6 F. 443, Union Life vs. University of Chicago.)

This case is also reported 10 Bissell 191. The first paragraph of the syllabus of the case as reported by Mr. Bissell is as follows:

"A bill was filed in the State Court to enjoin the foreclosure "of a mortgage and to have it set aside and declared void. Later "but on same day, a bill was filed in the United States Circuit "Court to foreclose the mortgage. The process from the United "States Circuit Court was first served. *Held:* That the fact that "the process of the United States Court was first served gave that "Court jurisdiction to go on with the foreclosure suit and deter-"mine all questions as to the validity of the mortgage."

See 28 C. C. A. 537, Hughes vs. Greene.

We contend that the Remington Company, being strictly within the constitutional amendment and using the due and well-known process of law on the statute books of Louisiana, had an undoubted constitutional right to bring into Court *its own* debtor and demand and obtain judgment, enforcing its own privileges against it, and not against some other person, who may be wholly without right and perhaps irresponsible. *In this instance such person is outside any known process of law*, and without authority to stand in judgment for our debt.

The error of the lower Court was in supposing that it had the equivalent of chancery jurisdiction, and that chancery would have allowed an *ex parte* order, taking a debtor's property away from him by a fiat of the judge *ex parte* and administering it itself and by a person not known nor qualified as a Louisiana officer.

Chancery never assumed such *jurisdiction*, but required a suit and return *nulla bona*, as our law does. Sec. 688, R. S., reads as follows: "They shall forfeit their charter for insolvency *evidenced by a return of no property found on execution;* and in such case it shall be the duty of the District Court, at the instance of any creditor, to decree such forfeiture, and to appoint a commissioner for effecting the liquidation, whose duty it shall be to convert all the assets of the company, including any unpaid balances due by the stockholders on their shares into cash, and to distribute

the same under the direction of the Court amongst the parties entitled thereto in the same manner, as near as may be, as is done in cases of insolvency of individuals." (Our italics.) Moreover, our law has always been opposed to chancery jurisdiction and special pains was taken to exclude it, except by a special enactment of such provisions as it might be desirable to adopt.

Our law has made a provision for the forfeiture of corporations at the instance of creditors and the appointment of commissioners. R. S., Sec. 688.

It has pointed out the duties of tutors, administrators, syndics, curators and other officers. *The law* has never invested a receiver with any power. Suppose he is appointed a receiver *ex parte*, what can he do when he walks out of the Court with his new title? Has he the power of a syndic?

This Court had declared, with all the emphasis it is capable, that such appointment is absolutely null and void.

See recent case of Ober vs. Manufacturing Co., 44 An. 570.

A common law Court of chancery (the proper parties being before it) has the power, by appointing a receiver, of investing him with the title, possession, custody, administration and distribution of the assets of a corporation or partnership. The receiver is an ancient and well-known officer of that system.

Has a Louisiana Court the same power, independent of statute law, and does the word equity in Article 21 of the Civil Code, mean Chancery Law? The article itself shows the contrary, for it defines what it means by the word equity. It appeals "to natural law and reason," or "received usages where the positive law is silent." Received usages does not mean received usages in other systems of law or other jurisdictions.

Louisiana has always been jealous of chancery law, the so-called equity, and has provided against its introduction, by its various constitutions prohibiting its introduction except by special enactments. These constitutions the judges have always been sworn to support. In 1841, the Legislature passed resolutions requiring our representatives and senators in Congress to endeavor to have the chancery law abolished in the Courts of the United States, sitting in Louisiana. See Acts 1841, page 72, No.

90, recitals and resolutions; 1 Hennen's Dig. Equity, p. 474; Succession of Franklin, 7 An. 395; Const. 1879, Art. 31; Const. 1812, Art. 4, Sec. 11; Const. 1845, Art. 120; Const. 1852, Art. 117.

The Constitution of 1898 recognizing that receivers had no place in our law, gave jurisdiction for the first time to District Courts to appoint them (Art. 109), and the Legislature by Act 159 of 1898 carries that article into effect.

The term receiver, when used by our Courts prior to 1898, implies nothing more than a sequestrator or collecting agent to take charge of goods during the pendency of a suit *against existing parties* for the benefit of the parties therein. His office is not to represent creditors nor to defend actions as a syndic or executor or administrator may do. He has no vested interest. He is no officer of the Court in whom title is vested. C. C. 2978, 2979.

It would be no contempt of Court to sue him. He can not prevent creditors from suing the partnership or *existing* corporation. He is not substituted in the place of the partnership or corporation. He simply derives his power, whatever it is, from the parties and the order of the Court in the cause.

The Supreme Court emphasizes this point, and says:

"In deciding that the plaintiffs can maintain the present "action, we are not to be understood as giving our sanction to an "opinion sometimes expressed that the judges of the inferior "Courts *without the* assent of *parties to a suit* or with the assent "of only one of them *can exercise the powers* of a chancellor, "and appoint of their accord a receiver for the purpose of col-"lecting and keeping the funds attached that may be the subject "of litigation. Our opinion is *that the capacity of the plaintiffs "is derived entirely by the consent of the parties* who were inter-"ested at the time they were appointed."

"We do not believe *that the assent of the judge added to their "powers in the slightest degree.* 4 Rob. 525, Frazier vs. Wilcox.

"The receiver is but the agent of the parties having the legal "right to sue. The executor of Joseph H. Palmer, deceased, and "James H. Massey might have united in a power of attorney and "appointed Helme their agent to institute the suit on their own "behalf in his own name, Eggleston vs. Colfax, 4 N. S. 481; 5 "N. S. 40; 4 Rob. 521; 5 Rob. 478.

The special provisions of law applicable to this case are Sec. 688 of the Revised Statutes and Sec. 1612, which is as follows: "Whenever the charter of any corporation in this State shall be "decreed forfeited by any competent Court, the district attorney "of the district shall forthwith inform the Governor of the fact, "who shall thereupon appoint a liquidator to take charge of and "liquidate the affairs of the corporation *as in case of insolvencies "of individuals.* In case of death, resignation or removal of any "liquidator so appointed, the Governor shall fill the vacancy; and "in case of refusal of any person appointed to act as liquidator, he "shall appoint the district attorney of the district, who shall be "dispensed with giving bond and security. This section shall "not apply to banking or other corporations whose liquidation is "otherwise provided for by law." The extreme case, in the face of those ample provisions, does not exist.

The Attorney General is required by law to bring certain suits for the forfeiture of banking and certain other corporations in the First Judicial District. R. S., Sec. 131; charters of banks are forfeited under Sec. 284, R. S.

Even a valid appointment of a receiver by the Comptroller of the Currency, and doubtless by a Court of chancery in a common law State, does not dissolve a corporation or prevent a suit.

Bank of Bethel vs. Pahquogue Bank, 14 Wallace, 383, syllabus No. 3.

No Court of Louisiana had declared the charter of the Delta company forfeited, and the corporation could not escape its debts by committing *felo de se.*

"A corporation can never dissolve itself so as to defeat any of the just rights of its creditors." Brown vs. Union Bank, 3 An. 182.

II.

There is another reason, if any further reason were needed, why the State Court had no right by its *ex parte* decree to deprive the Remington Paper Company of the assets of the Louisiana Printing and Publishing Company, Limited ,by volunteering a receiver.

The charter of defendant company, which entered into and formed part of the contract of plaintiff in error, contained the following provisions:

ARTICLE 6.

"All the corporate powers of said company shall be vested in and exercised by a board of directors composed of five stock holders of said corporation to be elected annually on the third Monday in April, the first election to be held in 1893. All such elections shall be by ballot and shall be held at the office of the company under the superintendence of three commissioners to be appointed by the board of directors. Ten days' prior notice of such elections shall be given by publication in one of the daily newspapers of New Orleans, and *the directors then elected shall serve and continue in office until their successors shall have been elected.*

"Each stockholder shall be entitled to cast in person or by proxy one vote for every share of stock held by him, and the majority of the votes cast at such election shall elect the directors for the ensuing year."

"If at any time there should be a failure to elect directors as above provided, such failure shall not dissolve the corporation, but the then existing board of directors shall continue to hold office, and as soon as may be thereafter, another election shall be held, whereof ten days' prior notice shall be given by publication in one of the daily newspapers of New Orleans. *Any vacancy occurring in the board of directors, from any cause whatever, shall be filled by the remaining directors. Three directors shall* constitute a quorum for the transaction of business."

ARTICLE 8.

"Whenever this corporation shall be dissolved, either by limitation or otherwise, *its affairs shall be liquidated by three commissioners to be appointed from among the stockholders at a general meeting to be convened for that purpose after thirty days' prior notice by publication in one of the daily newspapers of New Orleans, and with the assent of a majority in amount of the capital stock of said corporation; said commissioners shall continue in*

office until the affairs of the company shall have been fully liquidated; and in case of the death of one or more of said commissioners, the survivors or survivor shall continue to serve." (Rec. 135, 136.)

(The italics are ours throughout this brief.)

Had not the plaintiff in error the right to expect that the liquidation of the company would be carried out as agreed in the charter?

The minutes of the defendant company of May 16, 1893, however, showed what the directors intended, as they attempted to resign in a body. (Rec. 57.)

We have already said that the right to sue one's debtor whether a real person or a corporation, is an absolute right, and that any attempt to hinder or prevent the creditor from suing its debtor is a fraudulent act in the eyes of the law, and that there can not be any distinction as to the sanctity or validity of the decrees of the various courts, nor any discrimination made between suitors; every judge is presumed to be qualified to render justice to the parties before him within his sphere.

What the opinion of the lawyers given by Colonel Hill at the meeting of the 16th of May, 1893, was, we are not, as we have said, informed. But it is clear that the acts of the directors ignoring the provisions of the charter and countenancing proceedings at variance wtih the due process of law were constitutionally void.

III.

No Court of Louisiana had decreed or had power to decree that there should be a stay of proceedings as to creditors. Section 688, Revised Statutes, which provides for the forfeiture of charters on the return of *nulla bona* on judgment and execution, seems to apply only to scientific, literary, religious and charitable corporations. But if applicable to all corporations, can have no place here for want of the requisite return. In all other cases the State alone can demand. *In re* Mechanics Society, 31 An. 631; 30 An. 954; 37 An. 103.

Where, then, was the power to prevent the creditor who had furnished the paper for the concern from suing and seizing anything then belonging to the corporation, the title to which and

custody, had not been confided to any one else and had never been seized and taken by any valid warrant of any Court from the Delta company?

The attempt in this case to withdraw the assets of the corporation from the pursuit of creditors, under the pretence of the *ex parte* order obtained by them without process, was, if not a fraud, at least a violation of law.

"The president and directors were incompetent without the "consent of the stockholders to confess a forfeiture and thus "abandon a corporation which it was their duty to administer for "the interest of the stockholders. They had no authority by a "voluntary act or confession to surrender the charter to the cor-"poration." State vs. Atchafalaya R. R. & B. Co., 5 Rob. 64.

"A corporation can never dissolve itself so as to defeat any "of the just rights of its creditors." Syllabus, Brown vs. Union Ins. Co., 3 An. 177; also p. 182; Cook on Stockholders, Sec. 633; p. 655; 7 Paige R. 294, Ward vs. Sea. Insurance Co.

The rights of creditors can not be defeated by a mere declaration of a resignation of the officers on whom process should be served, and in this case the sixth article of the Delta charter as it happens, we say *arguendo*, protects the creditors.

One clause in 6th Art. says: "If at any time there should "be a failure to elect directors as above provided such failure *shall* "*not dissolve the corporation*, but the existing board of directors "shall continue to hold office, and as soon as may be thereafter "another election shall be held, whereof ten days' prior notice "shall be given," etc.

The validity of the service of process on Col. James D. Hill, president of defendant Delta Company, the officer on whom process is to be served by the charter, has not and can not be questioned. See Commissioners vs. Sellew, 99 U. S., pages 626, 627.

Se also Badger vs. U. S. *ex rel.* Bolles, 93 U. S. 599.

"An attempt to create a vacancy at a time when such action "is fatal to the creditor will not be helped out by the aid of the "Courts."

Same case, p. 605, top of page.

The distinction between a receiver in chancery and a receiver appointed by a Louisiana Court may be further illustrated by the

different rights conferred ~~by the different powers of the Courts to confer rights~~. neither

Chancery can not grant letters of administration nor probate wills. Louisiana Courts, being endowed with what in England belongs to the Ecclesiastical Courts, can do both.

Bankruptcy and insolvent proceedings can not in England be carried on either in chancery or Courts of ordinary (probate) or admiralty, but can be brought in our State Courts.

Chancery has power to appoint receivers and invest them with the custody of the debtor's assets and imprison and fine and imprison any one disturbing the receiver.

Our Courts can accept and force surrenders of insolvents and stay proceedings. Chancery has no such power. The syndic appointed by our Courts represents creditors and the transferred property of insolvent and holds the latter under the jurisdiction of the Court as well as an administrator under a probate Court.

In these instances the property is not subject to the pursuit and seizure of creditors, for it is held for the benefit of all the creditors. But tutors to minors and curators of interdicted persons are also appointed by the Courts. Without such appointment they could not represent the minor or interdicted persons, but their power, like a Louisiana receiver, is limited. They can neither prevent suits against their wards nor seizures of the wards' property after judgment. Just so it is with an ordinary Louisiana receiver. He is no syndic, nor liquidator appointed by the Governor, to a corporation whose charter has been declared forfeited, nor an executor or administrator. He simply *represents the parties* to the suit where he has been appointed, as we have seen. If he has been appointed in a partnership suit he can not prevent a suit against the partnership nor the seizure of property when judgment has been obtained, as it has already been settled by our Courts. It is not in the power of the debtor by the appointment at his instance of a so-called receiver to delay and hinder creditors and thus do fraudulent acts indirectly, which if done directly would be declared fraudulent and void. Calling him a receiver does not, as we have seen, invest him with a power the Court itself was not empowered to give. Creditors can not be so easily baffled in the pursuit of debt due them.

They have the right to get their judgments against corporations and issue their executions thereon, and show a return of *nulla bona* if they can. What may lawfully be done in a State Court can be done in the United States Court, in the same manner that it can obtain judgment against an administrator. La. Rev. Stat., Sec. 688.

The Louisiana so-called "receiver" can not fight off creditors and screen property. A Louisiana Court, by appointing a so-called "receiver," can not invest him with English chancery power, nor transform itself into an English chancery Court. The person is simply a Louisiana agent without power to prevent a seizure of the debtor's property. Our Courts say:

"*The judges of inferior Courts can not of their own accord "appoint receivers for the purpose of collecting or keeping* funds "or evidences of debt which may be the subject of litigation before "them. Such appointments can be made only with the consent "of *all the parties interested*, and the assent of the judge can add "nothing to the power of the person so appointed." Frazier vs. Receivers, etc., and Wilcox, 4 Rob. 517; Syllabus 4; see pages 523, 525, 528.

"It appears to us that the judge of the commercial Court "labors under the misapprehension as to the power and control "he has over the agents appointed by parties to superintend their "interest in the tribunal over which he presides. We have more "than once said that he has no right to appoint receivers and "trustees of his own accord and will to take charge of money or "property, unless in the cases pointed out by law." U. S. vs. Bank of U. S., 11 Rob. 433. * * * *

"Nor has it [the Court] authority when simply asked for "process to enforce a judgment which the United States had ob-"tained against the bank to impose such conditions, as have been "imposed in this case, and in effect enjoin the plaintiffs without "affidavit or bond or security." 11 Rob. 434.

"It is not in the authority of a Court to appoint *ex parte* a "receiver of the assets of a partnership. A writ of sequestration "or a rule upon defendants to concur in the appointment of a "receiver would be the proper remedies." Syllabus; 16 An. 277, Martin vs. Blanchin.

"No principle of law is better settled than Courts have no "power to appoint a receiver *ex parte* without notice or hearing of "the party in interest, *and unless* a basis for the appointment is "alleged and proved." High on Receivers, Secs. 17, 111, 115; 4 Rob., 517; Martin vs. Blanchin, 16 An. 237; Mallady vs. Mallady, 43 An. 832.

"*It is well established that Courts have no jurisdiction* to "appoint receivers for corporations in the absence of *express* "statutory authority." High on Receivers. "Where there is a "statute it excludes all other modes of proceeding." Eng. and Am. Encyclopedia, Vol. 20, p. 31, Secs. 287, 288, 292, 298, 303, 749, and authorities there cited; French vs. Gifford, 30 Iowa, 148; Hedges vs. Paquet, 3 Oregon, 77; Baker vs. La. Portable R. R. Co.

"*An ex parte order is absolutely null and void.* He is not "a receiver because he calls himself so." Ober vs. Manufacturing Co., 44 An. 570, 571.

In the face of these authorities there is no ground for our adversaries to stand on.

Their clandestine order, obtained without citation to any one, without proof, affidavit or bond, was absolutely null and void. It bound nobody, for there were then no parties, and was no stay of proceedings nor bar to a creditor, and could not prevent him from taking such conservative proceedings as the law allows. The law allows the *cessio bonorum*, and the forfeiture of charters in the modes pointed out by law, but it can not be pretended here that the mode pointed out by the eighth section of the charter of the Delta Co. or Sec. 1612 of the Revised Statutes, which provides that when a charter of the State has been decreed forfeited, the District Attorney shall inform the Governor, who will thereupon appoint liquidators, was attempted.

The appointment of a Louisiana receiver or sequestrator does not change the ownership of the property or rights of the parties. Creditors may still pursue it. The sequestrator or receiver in ordinary cases only represents the parties to the suit. He can not screen any of them from the pursuit of creditors.

"When property in the hands of a judicial sequestrator has "been seized under *process from another Court* than that which

"issued the sequestration, the former tribunal may pronounce on "the validity of the seizure, though it have no power to order a "release of the sequestration.

"The sequestration, whether conventional or judicial, creates "no lien or privilege. It is merely a conservative measure. The "possession of the *sequestrator* is that of the *party legally entitled "to it,* and in all cases the party against whom it has been obtained "may release the property by giving bond with security." 2 Rob. 150.

This case covers the case at bar. The Bank of Alabama, on a judgment *in the First Judicial Court,* had seized *"in the hands "of Frederic Buisson, judicial sequestrator,* the goods and chattels, "lands, tenements, moneys, effects or property of any kind which "he might have in possession or under his control belonging to "the defendant [Hozey & Bach] to an amount sufficient to satisfy "this writ, and particularly any *money* he might now or hereafter *"have in virtue of his office as judicial sequestrator,* of which "seizure nothing came into the hands of the sheriff," etc. (p. 151).

Interrogatories were propounded *to Buisson as garnishee.* Buisson pleaded to the jurisdiction and answered that as *judicial* sequestrator appointed by the commercial Court he had $1532.96. The exception to the jurisdiction was overruled, and it was held that the seizure was valid, and ruling of the Court was right, notwithstanding the appointment of the sequestrator by another Court.

The case implies that the bank then should apply to the commercial Court for whatever order was needful to protect its rights (page 154). This is precisely what we are trying on behalf of the Remingtons to do here.

A similar principle is laid down in the case of Jeffries against the Belleville Iron Works Company, 18 An. 682. The defendant corporation sought to make a voluntary surrender. A stay of proceedings was ordered, a syndic was appointed and a tableau of distribution was filed. It having been declared on plaintiff's *action of nullity* that the company could not make a voluntary cession, he (the plaintiff) having obtained judgment, disregarded the insolvent proceedings and issued a *fi. fa.* and made a seizure,

the validity of which being questioned the Supreme Court said, Mr. Justice Labauve being the organ of the Court: "We have "concluded after the most mature deliberation, that the judgment "homologating the tableau of distribution were [was] not binding "on plaintiff so as to prevent him from seizing money and effects yet in the hands of the so-called syndic or other garnishees such "money and effects being considered as the property of the com-"pany after the judgment setting aside the surrender." 18 An. 691; 15 An. 19.

Cleveland City Forge Iron Co. vs. Taylor Bros. Iron Works, 54 Fed. R. 8.

The recent declaration of the State Supreme Court that an *ex parte* order appointing a receiver is an absolute nullity, and that calling him receiver does not make him such, ought to be held decisive. 44 An. 570, Ober vs. Manufacturing Co.

We rely on our case as it stands of record. But if any outside statements are made they are repelled by the facts. The Remington case is still pending against the Delta Company in the Circuit Court. Process was duly made and served. Watson, in his allegel capacity of receiver, was refused by Judge Pardee the right to represent the Delta Company in the suit as defendant.

On the 29th day of May, 1893, the Remington Paper Company being a creditor of the Delta Company, and having the vendor's privilege on certain paper and the company having given a ground for attachment, sued out of the Circuit Court a sequestration, giving bond in the sum of $5000, and placed the same in the United States Marshal's hands, and the writs were served with the citation the same day (see Suit 12,197). If the Delta Company still existed it was our debtor and subject to the due process of law. The burden of proof is on our adversaries to show that the Remington Paper Co. had lost this constitutional right.

2. Pope & Watson claim that the seizure was illegal because Judge Ellis had issued May 17, 1893, an *ex parte* order without proof on a petition filed by Pope without a prayer for a citation to any one which did not contain a single allegation either under the common law, chancery jurisdiction or by the Louisiana law which would have authorized the appointment of a reciver. And there was no prayer to make the corporation or any one else a party to

the suit, and the case standing with Pope as the *only party* to it, the following order was rendered on the paper:

"The Court, considering the foregoing petition, and particu-"larly the intervention of the State of Louisiana, by her Attorney "General, of the creditor mentioned,

"It is ordered that John W. Watson be and he is hereby ap-"pointed receiver of the Louisiana Printing and Publishing Com-"pany, Limited, with full power to liquidate and wind up its af-"fairs. Let John W. Watson take the proper and legal oath, and "otherwise properly qualify. Let an inventory be taken by F. H. "Mortimer, notary public, of the assets and property of said Lou-"isiana Printing and Publishing Company, Limited, in this parish, "and let H. Messonier and Pat J. Kelly be appointed appraisers to "value the property, and let W. K. Horn, Esq., be appointed to "represent the absent creditors herein.

"New Orleans, May 17, 1893.

(Signed) "T. C. W. ELLIS, *Judge.*"

The judge was mistaken about the intervention of the State, which is drawn up in the same handwriting as Pope's *ex parte* petition. It was not filed at that time and was filed afterward, viz.: May 18, 1893, and it simply says that Pope alleges so and so, and make no positive allegation, such as the law requires on the part of the State. There being no prayer for a citation, none was issued until ten days afterward, but Watson filed an oath on the day after his appointment, May 18, 1893.

The whole proceeding shows an extraordinary haste to defeat creditors. Mortimer had made no inventory and Watson had given no bond, and no letters had issued to him or writ of sequestration issued when the Remington Company made its seizure. Did this take away our debtor from us and destroy its existence and transfer his property to another? All the power Watson had was what the *ex parte* order on Pope's *ex parte* petition conferred, and that was all that stood in the way of and arrested the suit of the Remington Company in the United States Court. Hence that *ex parte* decree, as we have seen, need only be declared invalid to entitle Remington Company to proceed with their suit.

THIS EX PARTE PROCEEDING BINDS NO ONE. Windsor vs. McVeagh, 93 U. S. 274. Syllabus No. 1.

It is absolutely null. See cases already quoted. 43 An. 832; 24 An. 338; 2 Rob. 150, 153; 3 An. 182; 44 An. 570.

The subject matter was not subject to an insolvent court. 15 An. 19; 18 An. 691.

If the *ex parte* order had been made *bona fide* in chancery it would not have bound the Remington Co., for the order, "as against "third persons or interested parties not notified, can not date or re- "late back beyond the order of appointing him, and it is irregular "and improper to insert such clause in the order of appointment, "as it would be unjust to vest the receiver with title at a period "previous to his appointment." Beach on Receivers, Sec. 168, p. 129. See also Van Alstyne, Sheriff, etc., vs. Cook Receiver, 25 New York, 489, where execution held against the receiver. See Beach on Receivers, 168, 419, 420.

3. Mr. Watson, at the time of the seizure by the *Remington Company*, had not given any bond, while the Remington Company had given bond for $5000.

It is laid down in the English and American Encyclopedia of Law that "The giving OF SECURITY IS A PREREQUISITE TO RECEIV- "ER'S CONTROL OF PROPERTY." Vol. 20, page 162.

We have already cited authorities to show that all acts which tend to deprive another of his legal remedies are reprobated by our law and give rise to damages. R. C. C., Art. 2315; Irish vs. Wright, 8 Rob. p. 428; Dennistown vs. Mattard, 2 An. 14, 16; Smith vs. Benneck, 12 Rob. 20, 568. *1 Chitty on Pleading, 132; 2 Hennen, page 1053.*

In the action of nullity allowed by Arts. 604, 612, 607, Code of Practice, the examples are not exclusive, but illustrative of the kind of cases which may be brought. 42 An. 194. The case of Jack vs. Harrison shows the right of a suitor to have obstacles removed which stand in the way of creditors' demand. 34 An. 736, 739, 740; Clark vs. Christen, 12 L. R. 394; Prichel vs. Bordelon, 9 Rob. 191.

If a third person chooses to appeal instead of bringing an action of nullity, he must take his adversary's case as he finds it. In

the action of nullity it is elementary he can allege and offer further proof.

Where such *ex parte* order is obtained collusively and used under the pretence that it is a valid order appointing the party a receiver, and the party thereby makes use of such pretence to deprive a creditor of his valid rights to an amount sufficient to give jurisdiction, the law will decree the nullity of such *ex parte* order the same as it would if it affected a real right (see R. C. C., Art. 2315); Irish vs. Wright, 8 R. 428; Haas vs. Haas, 35 An. 885.

ALBERT VOORHIES,
Of Counsel.